

ISSUES

Bonnie DeVore requests review of the ALJ's finding that she and James DeVore, deceased, had intentionally abandoned their marriage more than six months prior to the date of James DeVore's death.

Respondent requests that the Award entered by the ALJ be affirmed.

The issues for the Board's review are:

- (1) Did Bonnie DeVore and James DeVore, deceased, mutually abandon their marriage more than six months before the date of James DeVore's death?
- (2) Is the deposition testimony of Melinda Mitchell part of the record?

FINDINGS OF FACT

James DeVore, the decedent, and Bonnie DeVore were married on July 7, 1990. It is not disputed that they were never legally divorced or separated, and their marriage was not annulled. Immediately after their marriage, the decedent and Ms. DeVore lived with her parents. At some point, they moved into a home in Thayer, Kansas, and both of them worked for a garment factory in Chanute, Kansas. Ms. DeVore testified that after the garment factory closed sometime in 1997 or 1998, the decedent was on unemployment for awhile and then moved to Kansas City, Kansas, to find work. Ms. DeVore stayed in Thayer, Kansas, with her two daughters from previous relationships. There was testimony from Ms. DeVore, her two daughters, and her mother, Theresa Swisher, that the decedent's plan was to find a job and save his money to be able to move Ms. DeVore and her daughters to Kansas City so they could be together.

On June 13, 2000, the decedent was injured by a gunshot during an attempted robbery while he was working at a convenience store. As a result of his injuries, he was a paraplegic. He was first hospitalized at the Kansas University Medical Center (KUMC), after which he was moved to Medicalodge, a facility in Kansas City. In July 2001, he was moved to CLC, a nursing home in Olathe, Kansas. While at CLC, he was periodically transferred to Kindred Hospital in Kansas City for complications due to his injuries. About 2005, his condition worsened and he was transferred to Olathe Hospital, then Specialty Hospital, and then to Kindred Hospital, where he lived the last two years of his life. He died on May 2, 2007.

The decedent lived in Kansas City for about a year before he was shot. He came down on weekends to see Ms. DeVore and her daughters, but Ms. DeVore testified she did not travel to Kansas City to see him. He did not send her any money while he was working in Kansas City. They spoke with each other by telephone.

Ms. DeVore did not hear about the shooting until a couple of days later, when she was told about it by one of her cousins. She testified she was unable to visit the decedent while he was hospitalized at KUMC because she did not have a driver's license or a car and had no way to get to Kansas City. She tried to talk to him by telephone but could not get through to him. She does not have a computer or internet capability.

Ms. DeVore testified that she and the decedent did not share a checking account at any time after James moved to Kansas City. She knew he was receiving workers compensation benefits after his injury. She never received any of that money, saying that the decedent needed the money for incidentals while he was institutionalized at the nursing homes and hospitals. She testified that she made no demands of money from him, although at least twice after he was injured, he gave her \$250 to help her with rent. He also sent money to her daughters for Christmas and their birthdays.

Ms. DeVore was aware that Melinda Mitchell, one of the decedent's nurses at CLC, had power of attorney for him, although she testified she did not know that Ms. Mitchell had control over the money he received as part of his workers compensation benefits. She knew that Ms. Mitchell was responsible for taking care of the decedent's personal needs on an immediate basis, which she did by using the power of attorney. She testified that she did not object to an outsider having control of the decedent's money because she was showing him respect and because she is not money hungry.

Ms. DeVore did not look over or otherwise take responsibility for any of the decedent's finances from the date of his accident to the date of his death. She was not involved in any decisions concerning his medical care. The decedent's father was on the checking account where his social security payments were deposited. Ms. DeVore did not know why her name was not on that account but said that the decedent wanted his father's name on it.

After the decedent was transferred to the nursing home, Ms. DeVore would travel to Kansas City with her parents and visit him. She and her family would bring him to Humboldt, Kansas, to visit over the 4th of July holiday, his favorite holiday. When he was there, Ms. DeVore and her family would care for him. She said he had to be rotated because he had bed sores, and she had help doing this from her brother. She had a special bed for him, and ramps were constructed for him to get into the house. The last time they were able to bring him back was in July 2005. After that visit, his condition worsened and he could no longer come. Ms. DeVore visited the decedent one time in the hospital after the July 2005 visit. She testified she would have visited him more often but she had health problems. She has eczema and when it cracks her skin and she gets an infection, she cannot touch anyone with her hands because she could spread it. Ms. DeVore's daughters visited the decedent in Kansas City. She did not go with them because of her eczema and because there was not enough room for her in the vehicle. When the decedent was ill and close to death, her daughters went to see him and she stayed at home.

Ms. DeVore testified that she had continuous telephone communication with the decedent from the time he moved to Kansas City until he died. They provided each other with emotional support. They never discussed divorce, legal separation, or annulment of the marriage. She did not live with another man after the decedent moved to Kansas City. The decedent's death certificate indicates that at the time of his death, he was divorced. Ms. DeVore did not supply that information and believed it was supplied by his parents.

Ms. Devore stated that at one point she and her daughters tried to find a health care facility closer to the area where they lived. The closest facility she found was in Chanute, Kansas. However, that facility would not have been able to meet the needs of the decedent. By that time, he had developed complications that required him to have dialysis.

The decedent's parents made the funeral arrangements. They did not inform Ms. DeVore when the funeral would be, and she had to find out on her own. She went to the funeral.

Theresa Swisher is Bonnie DeVore's mother. She testified that her daughter and the decedent lived together in Thayer, Kansas, for eight years. Both decedent and her daughter worked at a garment factory in Chanute, Kansas, until the factory closed. The decedent was on unemployment for awhile and then moved to Kansas City to find work. She thinks he was in Kansas City a year or two before he was shot. Before he was shot, he would return to Thayer every other weekend.

Ms. Swisher testified that they would bring the decedent home for the 4th of July holiday. When the decedent was home for those visits, he would stay with Bonnie at night. Ms. Swisher's son would stay with them to help Bonnie turn him. Ms. Swisher testified that she and her husband visited James in the hospital. Bonnie did not go with them because of her eczema. However, they brought Bonnie with them five or six times to visit the decedent when he was in CLC. Ms. Swisher also testified that Bonnie and the decedent had many telephone conversations after he was shot.

April Bushong is Bonnie DeVore's daughter and the decedent's stepdaughter. She testified that the decedent moved to Kansas City when she was in the fifth grade. Before he was shot, the decedent would come back to see them when he could.

Ms. Bushong testified that she visited the decedent from 20 to 25 times while he was at the nursing home in Olathe, and from 10 to 15 times when he was in Kindred Hospital. She went with her sister, and her mother would stay home and watch her grandchildren. She also said that her mother could not go because of her skin condition.

Ms. Bushong said she remembered her mother having telephone conversations with the decedent until his death. She did not remember a time when her mother talked about getting a divorce from the decedent.

Right before the decedent died, April and her sister heard that he wasn't doing well. Ms. Mitchell called and had left a voice mail message saying that he probably would not last through the night. April called the hospital and was again told he probably would not make it through the night, so she and her sister went up to the hospital, along with April's husband and daughter. The decedent was not able to talk. They called their mother from the hospital and put the phone up to the decedent's ear, and she told him she loved him. They stayed at the hospital three or four hours and then returned to Chanute.

Ruby Goss, Bonnie DeVore's daughter, also visited the decedent, although not as often as her sister April. She testified that when she and April visited the decedent, they would have a cell phone and would call their mother from his room and put him on the phone with her. She also overheard her mother talking to the decedent on the phone from Chanute.

Ms. Goss confirmed that the decedent would return home every other weekend after he moved to Kansas City until he was injured. She said that the decedent would call about every other night after moving to Kansas City. She also remembered the times the decedent visited after he had been shot, saying that it took four people to turn him.

Ms. Goss did not think that either the decedent or her mother had abandoned their marriage. She said that her mother could not visit the decedent because of her skin condition.

Kenneth DeVore, decedent's father, testified that he paid the funeral expenses for his son. He testified that he did not think his son and Bonnie DeVore lived together for 12 to 15 years before his son's death. He further testified that four or five years before the shooting, decedent told him that he had left Bonnie and thought she had gotten a divorce. He also testified that the decedent traveled to Ohio to visit him and his wife in 1996 and at that time told his parents that he and Bonnie had divorced.

Janice DeVore, the decedent's mother, testified that the decedent and Bonnie DeVore were married at the time of the 1996 visit, but that her son called her some time after that and told her they had ended their marriage, the decedent had moved to Kansas City, and Bonnie had stayed in Thayer, Kansas.

Janice DeVore testified that after her son was shot, she kept in communication with him. From the time her son was shot until he died, he did not mention to her that he was seeing Bonnie DeVore. In fact, he never mentioned her at all. Janice DeVore did not think decedent and Bonnie had any relationship for five or six years before he was shot. She said that her son had several girlfriends during the time he lived in Kansas City and that she received a couple of telephone calls from his girlfriends. She admitted, however, that from 1994 to 2000, she had virtually no contact with the decedent, except the one time he came to Ohio to visit.

Melinda Mitchell was a nurse at CLC. The decedent was one of her patients. In addition to their professional relationship, Ms. Mitchell and her husband developed a personal friendship with the decedent. She testified that during the time she provided care for the decedent, she never met Bonnie DeVore, nor had she heard the decedent having a telephone conversation with her. Other than one time when the decedent told her he was once married to Bonnie Devore, he never mentioned her.

Ms. Mitchell was given James' power of attorney because she was helping him with his finances and was keeping in contact with his parents. She was never asked to make any contact with Bonnie DeVore, nor did the decedent ask her to issue any checks out of his account for the benefit of Bonnie DeVore. She never contacted Bonnie DeVore before making any decisions concerning the decedent, but would consult with his parents, with whom she had weekly contact.

PRINCIPLES OF LAW

Where death results from an injury, K.S.A. 1999 Supp. 44-510b provides:

(a) If an employee leaves any dependents wholly dependent upon the employee's earnings at the time of the accident, all compensation benefits under this section shall be paid to such dependent persons. Such dependents shall be paid weekly compensation, except as otherwise provided in this section, in a total sum to all such dependents, equal to 66 2/3% of the average gross weekly wage of the employee at the time of the accident, computed as provided in K.S.A. 44-511 and amendments thereto, but in no event shall such weekly benefits exceed, nor be less than, the maximum and minimum weekly benefits provided in K.S.A. 44-510c and amendments thereto, subject to the following:

. . . .

(2) A surviving legal spouse shall be paid compensation benefits for life or until remarriage

The maximum amount of compensation benefits payable under K.S.A. 1999 Supp. 44-510b shall not exceed the amount of \$200,000.²

The statute governing death benefits, K.S.A. 1999 Supp. 44-510b, does not define the phrase "surviving legal spouse." But another statute, K.S.A. 1999 Supp. 44-508, defines the phrase "members of a family" which addresses the phrase "surviving legal spouse." That statute provides, in part:

(c)(1) "Dependents" means such members of the employee's family as were wholly or in part dependent upon the employee at the time of the accident.

² K.S.A. 1999 Supp. 44-510b(i).

(2) "Members of a family" means only surviving legal spouse and children In the meaning of this section, a surviving spouse shall not be regarded as a dependent of a deceased employee or as a member of the family, if the surviving spouse shall have for more than six months willfully or voluntarily deserted or abandoned the employee prior to the date of the employee's death.³

And the appellate courts have held that a surviving spouse is not entitled to receive compensation under K.S.A. 44-510b when the spouse abandoned the deceased employee or when there has been a mutual abandonment of the marriage. In *Redditt*,⁴ the Kansas Court of Appeals held:

The plain language of K.S.A. 1999 Supp. 44-508(c)(2) suggests that the Kansas Legislature did not mean to preclude application of the doctrine of mutual abandonment. The statute merely states that a surviving spouse is not eligible for death benefits if he or she abandoned the employee spouse for more than 6 months prior to the employee's death. Under the plain language of the statute, a surviving spouse could later abandon the marriage even after he or she had previously been abandoned by the employee. It is a fundamental rule of statutory construction that the intent of the legislature governs if that intent can be ascertained. (Citation omitted.)

The concept of mutual abandonment fits squarely within K.S.A. 1999 Supp. 44-508(c)(2). We see nothing in the plain language of the statute which would convince us that the legislature did not envision a situation where both spouses abandoned their marriage. However, the facts of the instant case will determine whether mutual abandonment took place.

ANALYSIS

Bonnie and James DeVore were married in 1990 in Iola, Kansas, and thereafter lived together continually as husband and wife until sometime in 1997 or 1998, when they both lost their jobs after the factory where they both worked in Chanute, Kansas, closed. James moved to Kansas City, Kansas, to find work. Their plan was for Bonnie and her children to follow James to Kansas City after he found work and was established. In the meantime, James regularly returned to Thayer, Kansas, to spend weekends with Bonnie and the children. Their plans were abruptly and permanently interrupted when James was shot on June 13, 2000. Thereafter, James was either hospitalized or in a nursing home until his death on May 2, 2007.

³ K.S.A. 1999 Supp. 44-508.

⁴ *Redditt v. McDonald's Restaurant*, 28 Kan. App. 2d 802, 805, 20 P.3d 1286, rev. denied 271 Kan. 1037 (2001); see also *Redditt v. McDonald's Restaurant*, 26 Kan. App. 2d 547, 990 P.2d 759 (1999).

The facts in this case are very different from the situation in *Redditt*. Neither James nor Bonnie willfully deserted the other or the marriage, and there was no mutual abandonment of their marriage. There were no affirmative acts such as filing for separate maintenance or divorce by either party or the assumption of new relationships. The testimony of James' parents to the contrary is not persuasive. The initial separation when James moved to Kansas City to find work was forced upon them by financial circumstances and was intended to be temporary. Then a separation was forced upon them by the shooting and resulting work-related injuries. Despite that separation, a relationship continued between them, and neither James nor Bonnie expressed or demonstrated an intent to abandon the marriage. There was no willful or voluntary desertion or abandonment of James by Bonnie, and no mutual abandonment of the marital relationship by the mere passing of time.

Bonnie did not own a car and did not have a driver's license. She also did not visit James in person because of her eczema. Nevertheless, she stayed in contact with James by telephone and there was also his occasional visit to Humboldt, Kansas, on the Fourth of July holidays. While this was not a typical or ideal marital relationship, it was a relationship nonetheless, and it continued up until James' death. They were emotionally dependent upon each other.

Next, Bonnie DeVore objects to the inclusion of the deposition testimony of Melinda Mitchell because it was taken as a discovery deposition and because the witness discontinued the deposition before Bonnie's attorney had finished his cross-examination. First, the court reporter erroneously titled the deposition as a "Discovery Deposition." The Notice to Take Deposition filed by respondent's counsel clearly showed that it was noticed as an evidentiary deposition. Second, although the witness prematurely terminated the deposition, counsel for Bonnie DeVore acknowledged that he never attempted to reschedule the deposition and subpoena the witness, he did not take his objection to the ALJ by scheduling a hearing on a motion to strike the deposition, and he did not make a record or proffer of what questions he was prevented from asking Ms. Mitchell and how Bonnie DeVore was prejudiced. From a reading of the testimony it appears that the questioning of Ms. Mitchell had strayed into areas of little probative value to the issues in this case except perhaps as going to the credibility of the witness. Accordingly, the objection to the deposition being admitted and considered is denied.

Finally, the Board finds that the amount of the death benefit is controlled by the law in effect on date of accident, not the date of death.⁵ As such, the death benefit is \$200,000 rather than \$250,000.

⁵ *Osborn v. Electric Corp. of Kansas City*, 23 Kan. App. 2d 868, 936 P.2d 297, rev. denied 262 Kan. 962 (1997).

CONCLUSION

(1) There was no mutual abandonment of the marriage nor a willful abandonment by either James or Bonnie DeVore.

(2) The deposition testimony of Melinda Mitchell is part of the record.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated August 13, 2008, is reversed.

Bonnie DeVore is entitled to a death benefit award in the amount of \$200,000 from May 2, 2007, the date of the deceased claimant's death. As of December 31, 2008, there would be due and owing to Bonnie DeVore 87 weeks of death benefits at the rate of \$158.57 per week in the sum of \$13,795.59. Thereafter, the remaining balance of \$186,204.41 shall be paid at the rate of \$158.57 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of December, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the majority's opinion.

First, we would find that the parties had abandoned their marital relationship and therefore, we would affirm that aspect of the ALJ's Award. Like the ALJ, we are not persuaded that the marriage remained intact after James DeVore left the parties' residence and reestablished himself in Kansas City. The testimony regarding the contact between Bonnie and James DeVore during the relevant time periods is inconsistent. Mr. DeVore's parents seem to think that there was very little contact and that there was, in fact, a divorce after James moved to Kansas City. Conversely, Bonnie DeVore and her daughters testified that there was telephone contact, although not on any sort of regular basis. And certainly after the accident, when James was confined to the various hospitals and institutions, his ability to freely communicate with Bonnie was significantly hampered, more so given Bonnie's apparent issues with a skin condition.

Nonetheless, after considering all the evidence, we believe that the marital relationship was abandoned. It was Melinda Mitchell, not Bonnie, who was privy to claimant's financial dealings while confined to the nursing home. Ms. Mitchell was in contact with James' *parents* on a weekly basis, not Bonnie's daughters. Bonnie's daughters made the trip to visit with him on a number of occasions, not Bonnie. James rarely provided Bonnie with any significant monetary assistance, and she admits asking for nothing on a regular basis. There is some indication that he had a cell phone so communication on that basis could certainly have facilitated an emotional connection. Even the few trips home over the July 4th holiday did not result in photographs of the two of them together. Instead, there is a solitary picture of James holding a child. For these reasons, we would affirm the ALJ's conclusion that the marital relationship was abandoned.

We would not, however, affirm the ALJ's decision to award Kenneth and Janice DeVore the \$25,000 contemplated by the Act. Nor do we endorse the majority's decision to reverse the ALJ's Award, which in essence takes away that portion of the Award from Kenneth and Janice DeVore.

This case has taken a rather lengthy route to its conclusion. And unfortunately, at the end of this route there appears to be a significant issue involving the due process rights of Kenneth and Janice DeVore. The parents were never made a party to this claim nor given notice of the proceedings. They were witnesses, endorsed by the respondent in the hopes of establishing that the marriage was abandoned as the respondent (and its carrier) no doubt realized that it was far cheaper to pay the remaining legal heirs the \$25,000 than the surviving spouse \$200,000. But the parents were not given notice of any of the proceedings. And now, under the majority's decision, their entitlement to the \$25,000 has now been legally taken away, again without any notice or opportunity to be heard.

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.⁶ The Kansas Supreme Court has recognized in numerous cases that the right to cross-examine witnesses testifying at administrative hearings of a quasi-judicial character is an important requirement of due process.⁷

In *Adams*⁸, the Kansas Supreme Court stated:

In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:

"An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . ."

The requirements of an administrative hearing of a judicial or quasi-judicial character are phrased in this language in 2 Am. Jur. 2d, Administrative Law, § 412, p. 222:

". . . A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial, and if such a hearing has been denied, the administrative action is void. . . ."

It appears clear that by reversing the ALJ's Award of \$25,000 to Kenneth and Janice DeVore without notice, much less any hearing giving voice to whatever evidence they might offer in support of their position, violates every notion of constitutional due process.

Moreover, we are concerned that there is precious little evidence within the record that would allow the ALJ to conclude that Kenneth and Janice DeVore are his "legal heirs" and

⁶ *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 473 P.2d 72 (1970).

⁷ *Wulfkuhle v. Kansas Dept. of Revenue*, 234 Kan. 241, Syl. ¶ 2, 671 P.2d 547 (1983).

⁸ *Adams v. Marshall*, 212 Kan. 595, 601-02, 512 P.2d 365 (1973).

that James DeVore "did not leave any dependents." If this conclusion is based upon a judicial determination made within some sort of probate action, that information is not included within the file.

Accordingly, we would affirm the ALJ's conclusion that the marriage of Bonnie and James DeVore was abandoned, thus denying her any benefits under the Act. Further, we would reverse the ALJ's conclusion that the parents, Kenneth and Janice DeVore, are the sole "legal heirs" and remand that issue to the ALJ for further proceedings, giving notice to all parties concerned.

BOARD MEMBER

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